Nos. 16367 and 16368

In the United States Court of Appeals for the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RAYONIER INCORPORATED, A CORPORATION, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE UNITED STATES

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BRIEF FOR APPELLEE UNITED STATES

JURISDICTIONAL STATEMENT

These actions were brought by appellants against the United States under the Federal Tort Claims Act to recover damages for property losses allegedly sustained by reason of the negligence of Government employees. The jurisdiction of the United States District Court for the Western District of Washington, Northern Division, was invoked under 28 U.S.C. 1346(b). On March 1, 1954, the district court dismissed the

complaints with prejudice. On September 1, 1955, this Court affirmed. *Rayonier Incorporated* v. *United States,* 225 F. 2d 642; *Arnhold, et al.* v. *United States,* 225 F. 2d 650. On January 28, 1957, the Supreme Court vacated the judgments of this Court and remanded the cases to the district court for trial. *Rayonier Incorporated* v. *United States,* 352 U.S. 315.

On June 23, 1958, following the conclusion of trial, the district court filed a memorandum opinion (R. 171-205). On July 1, 1958, the court filed findings of fact and conclusions of law (R. 205-215). On July 10 1958, judgment was entered dismissing the actions with prejudice (R. 215-217).

On July 18, 1958, the appellants in each action filed motions to amend the findings of fact, conclusions of law and judgment (R. 219-224, 473-479). On September 15, 1958, the district court filed amended findings of fact and conclusions of law (R. 227-237). On September 16, 1958, the court entered an order amending its previously filed memorandum opinion (R. 238-241).

On September 18, 1958, notice of appeal was filed by appellant Rayonier (R. 295-296). On the following day, notice of appeal was filed by appellants Arnhold, et al. (R. 479-481). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

These actions were brought against the United States to recover damages for property loss sustained by the appellants in a forest fire on the Olympic Peninsula in the State of Washington. The cases were consolidated for trial. These appeals are from the joint judg-

ment of the district court dismissing the actions.[1] This judgment was based on the determination of the district court, following an extensive trial at which the testimony of thirty-two witnesses was taken in approximately 4600 pages of transcript, that the damage to appellants' property was not proximately caused by the negligence of Government employees.

We set forth below (1) the prior history of this litigation; (2) the salient facts as reflected by the record; and (3) illustrative examples of statements contained in the appellants' briefs which we believe to be unsupported by the record or based on material taken out of context.

1. *The prior history of the litigation.* In broad outline, the complaints which were before this Court on the prior appeals [2] alleged that the forest fire had been started on August 6, 1951 by sparks from a Port Angeles Western Railroad (P.A.W.) train which was proceeding on its right-of-way across the Olympic National Forest. It was asserted that the Forest Service of the Department of Agriculture undertook to fight the fire, which spread first to a 60-acre tract and then to a 1600-acre tract. The fire was allegedly

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[1] In the *Arnhold* case, suit was brought additionally against the Port Angeles Western Railroad and Fibreboard Products, Inc., based upon diversity of citizenship. The district court dismissed the *Arnhold* complaint against these defendants as well as the United States and this dismissal is encompassed in the *Arnhold* appeal.

The district court also dismissed a cross-claim and counterclaim filed by the United States against the Railroad and appellant Rayonier respectively. The United States has not taken an appeal from this dismissal.

[2] *Rayonier Incorporated* v. *United States,* 225 F. 2d 642; *Arnhold, et al.* v. *United States,* 225 F. 2d 650.

brought under control within the 1600-acre tract by August 11, 1951, where it smoldered until September 20. On the latter date, it escaped from the area onto lands including those of appellants.[3]

The negligence charged to the United States by the complaints consisted in general of:

(1) the failure to require the Railroad to maintain proper safety precautions in the operation of its trains;
(2) the failure to require the Railroad to keep its right-of-way clear of inflammable materials;
(3) the failure to maintain adjoining public lands in safe condition; and
(4) the failure to extinguish the fires by utilizing insufficient manpower, tools, equipment, water and supplies before the forest fire reached appellant's property.

In affirming the district court's dismissal of the complaints, this Court determined that, under the allegations measured in terms of Washington law, the sole proximate cause of the damage was the recurrence and spread of the fire after it had been contained and brought under control in the 1600-acre tract. 225 F. 2d at 644. For this reason, the Court held that liability could not be predicated upon conduct allegedly occurring prior to the spread of the fire to that tract. *Id.* The Court nevertheless went on to rule that, in any

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[3] The allegations of the *Rayonier* complaint were summarized by this Court in its earlier opinion. 225 F. 2d at 643-644. As this Court noted, the allegations of the *Arnhold* complaint were substantially the same. See 225 F. 2d at 651.

event, the Government was under no duty to maintain the Railroad's right-of-way in satisfactory condition since (1) the right-of-way was at least equivalent to an easement and (2) the duty to third persons to maintain an easement rests solely upon the holder of the dominant estate. *Ibid.* at 646. Further, the Court determined that, under the common law, the alleged failure to maintain safe conditions on property adjoining a railroad right-of-way does not render one liable for damages because a fire, originating on the right-of-way, spreads across his land to other land. *Ibid.* at 646-647.

Turning then to the liability of the United States for the asserted negligent failure of the Government to prevent the spread of the fire from the 1600-acre tract, the Court held that (1) the Forest Service was fighting the fire in the capacity of a public fireman; and (2) the Supreme Court in *Dalehite* v. *United States*, 346 U.S. 15, had determined that the Tort Claims Act does not extend to claims grounded upon the asserted negligent failure of public firemen to extinguish a fire. 225 F. 2d at 645-646. In determining that the fire was being fought in the capacity of public firemen, the Court ruled that, under Washington law, there was no obligation on the United States as a landowner to extinguish the fire. *Ibid.* at 648-649.

The Supreme Court vacated this Court's judgments. *Rayonier Incorporated* v. *United States,* 352 U.S. 315. In doing so, however, it held simply that the United States may be held liable under the Tort Claims Act for the derelictions of its public firemen. It did not pass upon this Court's interpretation of Washington law regarding proximate causation or landowners' re-

sponsibility, other than to suggest, without elaboration, that that interpretation might not have been "wholly free" from the acceptance by this Court of the statements in the *Dalehite* opinion respecting public firemen. 352 U.S. at 320.[4] The cases were remanded to permit the district court to determine "whether the allegations and any supporting material offered to explain or clarify them would be sufficient to impose liability on a private person under the laws of the State of Washington." *Ibid.* at 321.

2. *Summary of the evidence adduced at trial.*[5] At all times pertinent to this litigation the United States owned certain tracts of forest lands, including Section 30, Town 30 North, Range 10 West, Willamette Meridian, on the Olympic Peninsula in the State of Washington. These lands were in the Soleduck District of the Olympic National Forest.

Some time prior to 1951, and effective during that year, the United States entered into a "Cooperative Agreement" with the State of Washington. Under the agreement, the United States was responsible for fire protection on all lands within a designated area, whether in national, state, or private ownership. The United States undertook to take "immediate vigorous action" to control fires occurring within this protected area. The agreement did not, however, specifically re-

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[4] With regard to the *Dalehite* discussion of public firemen upon which this Court had relied, the Supreme Court indicated that it had been necessarily rejected in *Indian Towing Co.* v. *United States*, 350 U.S. 61.

We do not believe that, to any extent, this Court's interpretation of Washington law rested upon the *Dalehite* case.

[5] A more detailed treatment of many facets of the evidence is contained in the argument portion of the brief, *infra*, pp. 27-55.

quire the United States to abate fire hazards on any lands within such area. This agreement covered Section 30 and all other land burned prior to September 20, 1951, in the forest fire, as well as most of plaintiffs' property burned thereafter in the so-called "Forks fire." (R. 173-174; Fdg. IV, R. 230; Exh. 24.)[6]

The United States owned all of the land in the 60-acre fire area; and part of the land in the 1600-acre fire area was owned by the United States and the remainder was owned by appellee Fibreboard Products, Incorporated (Fdg. IV, R. 230).

Under a conditional sales contract from United States Spruce Corporation dated March 31, 1937, and to and including all times pertinent to this action, P.A.W. had a conditional sales contract vendee's interest in, and operated, a common-carrier railroad between the Towns of Forks and Port Angeles, Washington, a distance of approximately 70 miles, which passed through the Section 30 in a general east-west direction. Under the terms of this contract, P.A.W. had possession of the railroad property, and agreed, among other things, to maintain the property in a good and safe operating condition, and to comply with all laws and lawful regulations pertaining in any manner to the operation thereof. Provision was made for forfeiture of the vendee's rights upon default in performance of any of the covenants in the contract (Exh. 7).

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[6] For convenience the fire from the time of its origin and for approximately twenty-four hours thereafter on August 6 and 7, will be designated the "60-acre fire"; thereafter from August 7 to September 20, as the "1600-acre fire"; and on and after September 20, 1951, as the "Forks fire."

The 100-foot wide railroad right-of-way through Section 30, was conveyed by the Clallam Lumber Company to the Siems, Carey-H. S. Kerbaugh Corporation by deed dated December 28, 1918 (Exh. 3); and by the Siems, Carey-H. S. Kerbaugh Corporation to the United States Spruce Corporation in March 1919 (Exh. 4).

Subsequent to the execution of the conditional sales contract between the Spruce Corporation and P.A.W., Spruce Corporation assigned and transferred all of its interest in and to the contract to the United States on November 30, 1946 (Exh. 8); and as of the same date conveyed to the United States all of its railroad property. The document covering this grant contained the following provision:

> It is expressly understood that the rights of the Grantor herein to so much of the right of way over and across the above described sections as is located upon lands comprising a part of the Olympic National Forest are limited to those rights thereto of use and occupancy acquired by virtue of that certain letter dated August 5, 1918, addressed to the Secretary of War by the Secretary of Agriculture providing for the construction and maintenance of the said road over lands within the Olympic National Forest, which rights were assigned to the United States Spruce Production Corporation by the Acting Director of Aircraft Production by an instrument in writing dated October 10, 1918, and further, to those rights acquired by the Port Angeles Western Railroad Company

under a formal application for a right of way across the said Olympic National Forest, which was filed with the United States Department of the Interior on May 3, 1938 and approved September 18, 1939 subject to the terms and conditions of Section 24 of the Federal Power Act of June 10, 1920, which rights were acquired by Grantor herein under that certain indenture executed by the Port Angeles Western Railroad Company the 13th day of December, 1937, which instrument is recorded in Volume 136 at Page 627 of the Deed Records of Clallam County, Washington. (Exh. 5.)

In connection with and as part of the 1938 application for a right-of-way mentioned in the grant, and as required by the Right-Of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, and Regulations of the Department of Interior thereunder, the Railroad entered into stipulations with the United States Department of Agriculture, Forest Service, and the Department of Interior, National Park Service, on July 18, 1939 and August 2, 1939, respectively. In these stipulations the Railroad agreed, among other things:

1. To require its employees, contractors and employees of contractors, both independently and at the request of [forest and national park service officers] to do all reasonably within their power to prevent and suppress forest fires.

2. To allow officers of the [forest and national park service] free and unrestricted access in, through and across all lands provided by said right

of way in the performance of their official duty * * *

3. To comply with the regulations of the [Departments of Agriculture and Interior] concerning the [national forest and park] * * *

* * * * *

7. To prevent the spread of fire originating on the Applicant's right of way, or through its agency or neglect, * * *. The provisions of this paragraph shall apply to the entire right of way of the Applicant within the exterior boundaries of the Olympic National Forest.

8. To clear and keep clear of any timber and other inflammable substances, all of said right of way, all other lands owned or controlled by the Applicant as a right of way however acquired, lying between the points where the center line of said right of way intersects said [forest and park] boundaries, and all lands of said [forest and park] within 200′ of said centerline; * * *

* * * * *

12. To cut snags over 15′ in height 12″ D.B.H. within 150 feet of center line. To clear and keep clear for a distance of 2 to 4 feet beyond end of ties, the grade to mineral soil in a manner satisfactory to the [forest and park] officer in charge.

13. To burn inflammable material accumulating during construction or maintenance within 25 feet on each side of the track in the discretion of the

> [forest and park] officer in charge. * * * (Exhs. 10 and 11.)

Neither in these stipulations nor in the conditional sales contract did the United States agree to assume any obligation to maintain the right-of-way or abate any fire hazardous condition thereon.

Because of financial difficulties, P.A.W. had for some time prior to August 6, 1951, permitted its right-of-way to fall into a substandard condition in that grass, weeds, and other vegetation grew near and between the tracks; about twenty-five per cent of the ties were rotten; and old ties which had been removed were scattered along the right-of-way within a few feet of the tracks (R. 174-175; Exhs. 18-22; Exh. 177, p. 5).

The Soleduck Valley, through which the Soleduck River flows, runs in a general east-west direction. On the Olympic Highway in Section 30, and at a point approximately 200 to 300 feet from the Soleduck River, there is a group of buildings known as Heckleville. South of this point at a distance of one-quarter to one-half mile were the tracks of the P.A.W. About a mile east of Heckleville, Fibreboard maintained a logging camp known as Camp One which was sometimes referred to as Soleduck. Approximately four miles west of Heckleville on the Olympic Highway, the Forest Service maintained Snider Ranger Station, and about two miles directly northwest of Heckleville it maintained North Point Lookout. Also on the Olympic Highway and about 14 miles west of Heckleville, Rayonier operated a logging camp at Sappho. Farther west on the highway, the State of Washington main-

tained and operated a forestry office, including a fire suppression crew of 7 or 8 men and equipment, at Tyee which was 18 miles west of Heckleville (Exh. 177, pp. 1-4, 8).

All of the duties of the United States, both as landowner and under the Cooperative Agreement with the State of Washington were exercised in this area at the local level by District Ranger Floe of the Snider Ranger Station and Forest Service employees under his supervision. These employees included, among others, a small group of fire fiighters known as a fire suppression crew. Necessary equipment for this crew, including radios, was maintained at the station as well as certain weather instruments to measure humidity, temperature, and wind velocity. There was at the station a so-called "fire suppression plan" which was in effect in this District during the summer of 1951 (Fdg. VII, R. 231; Exhs. 14 and 177, pp. 3, 4 and 8).

The spring and summer months of 1951 were among the driest on record in the Soleduck District. Burning conditions in August 1951 were severe. A forest closure notice was issued by the Forest Service covering the period July 2 through September 15, 1951, as was normally done each year (Fdg. VIII, R. 231-232; Exh. 27; Tr. 4546).[7]

Around mid-day on August 6, 1951, a P.A.W. locomotive ignited a number of small spot fires along the Railroad right-of-way in Section 25, Town 30 North, Range 11 West, Willamette Meridian, and in Section 30 which was immediately to the east thereof. The

[7] "Tr." refers to the transcript of evidence which is not contained in the printed record under order of this Court (R. 335-339).

P.A.W. train crew discovered and extinguished one of these fires by backing up the train, putting water on the fire from the supply which it carried and then digging out the fire (Exhs. 61, 177, p. 9; R. 175; Fdg. X, R. 232).

At 12:30 p.m. on August 6 smoke from a spot fire in Section 25 was reported to the Snider Ranger Station by the North Point Lookout. District Ranger Floe promptly dispatched to this fire his entire immediately available fire suppression force under the supervision of Assistant District Ranger Evans. This crew went to the fire in a radio-equipped panel truck. Evans also had with him hand tools for all crew members, backpack cans and a walkie-talkie radio (R. 175-176, Exh. 177, p. 10).

Evans arrived at the fire about 12:45 p.m. and promptly informed the District Ranger of the size and characteristics of the fire. Floe advised him that he would try to get a railroad locomotive to return to the scene of the fire to help put it out. This fire was soon brought under control by Evans and his crew (Exh. 177, pp. 10 and 11).

Between 12:30 and 1:00 o'clock Floe called the timekeeper at Fibreboard Camp One and asked him to have the train crew bring the locomotive back to the fire at Section 25. Thereafter Floe called repeatedly trying to find out why the engine did not return. A member of the P.A.W. crew was standing by at a telephone beside the tracks, but Floe did not know of the existence of this P.A.W. phone. Meanwhile the Railroad crew, aware at least of one fire on the right-of-way, had stopped at Camp One intending to return the locomo-

tive to put out this fire. But when they attempted to back up the engine they found that a broken equalizer bar prevented them from doing so. Prior to 1:30 Floe had also called the Lookout to determine if he could see the train, and he had also tried three times without success to reach the President of P.A.W. Floe did not learn of the breakdown of the engine until at least 1:35 p.m. (R. 176; Fdg. X, R. 232; Exh. 177, pp. 11 and 13; Tr. 534-538, 746-751, 3429-3435).

At 1:00 p.m. the North Point Lookout reported to Snider Station the smoke of another spot fire, which he estimated to be about one-eighth acre in size. This fire had started on the right-of-way in Section 30 almost due south of Heckleville, and was the only spot fire which was not extinguished promptly. Floe knew of the location of the fire and was aware of the physical characteristics of the area around it (Exh. 177, p. 11; Tr. 526).

If the P.A.W. engine had returned, as Floe anticipated when he called for it, it automatically would have taken care of the Heckleville fire on its way back and put it out. It was the nearest and fastest equipment. It had a pump with tremendous steam pressure, water in the tender, and a 500-foot hose of 1½" diameter. An engine thus equipped is a potent striking force on a small fire, equivalent to an initial attack crew; and Floe's reliance upon it was prudent action on his part (Tr. 826-27, 865-67, 2744, 3436, 3473, 3587-90, 3763, 3855, 4017).

After several unsuccessful attempts to reach Evans by radio, Floe finally talked with him about 1:30 and directed him to the Heckleville fire. Evans found that

the road went only about one-quarter of a mile ahead, and he and Floe concluded that the best way to the fire was around by Snider Station on the highway (Tr. 730-33, 1001-04, 1169-71, 3430-33, 3438-9).

At about this time Evans was joined by two more Forest Service employees, with a power wagon, jeep and water. Taking three men with him, Evans left for the Heckleville fire and en route met a Fibreboard tanker which Floe had previously ordered for the first fire (R. 176, Exh. 177, pp. 11 and 12; Tr. 1005-8, 3433).

Between 1:30 and 2:00 p.m. Floe telephoned the P.A.W. President requesting him to authorize the use of a locomotive owned by Rayonier; and at the same time he called Sappho Camp and requested the locomotive. By 2:00 p.m. he was advised that the engine was being sent. At 2:10 p.m. he requested that the State fire crew be alerted to stand by. At 2:27 the North Point Lookout reported to him that the Heckleville fire was about two acres in size (R. 176; Exh. 177, p. 14; Tr. 758, 832).

In the meantime Evans, having stopped at Snider Station to pick up additional equipment, arrived at the Heckleville fire at 2:30 p.m., after traveling about five miles by truck and foot and wading the Soleduck River. He promptly reported to Floe the dimensions of the fire which was then burning between the tracks and on the right-of-way. On the north side, it covered an area about 200 to 300 feet along the track 100 feet deep, and there were two small spots to the south. He estimated the size at about an acre. At this time Evans considered this a small fire and believed that he could put it out with the men he had.

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Between 1:30 and 2:00 p.m. Floe telephoned the P.A.W. President requesting him to authorize the use of a locomotive owned by Rayonier; and at the same time he called Sappho Camp and requested the locomotive. By 2:00 p.m. he was advised that the engine was being sent. At 2:10 p.m. he requested that the State fire crew be alerted to stand by. At 2:27 the North Point Lookout reported to him that the Heckleville fire was about two acres in size (R. 176; Exh. 177, p. 14; Tr. 758, 832).

In the meantime Evans, having stopped at Snider Station to pick up additional equipment, arrived at the Heckleville fire at 2:30 p.m., after traveling about five miles by truck and foot and wading the Soleduck River. He promptly reported to Floe the dimensions of the fire which was then burning between the tracks and on the right-of-way. On the north side, it covered an area about 200 to 300 feet along the track 100 feet deep, and there were two small spots to the south. He estimated the size at about an acre. At this time Evans considered this a small fire and believed that he could put it out with the men he had.

When he received Evans' report, Floe immediately requested the assistance of the State crew. At about 2:40 p.m., he asked P.A.W. to have Fibreboard send a bulldozer and crew. At the same time, he called the Rayonier camp for men and equipment and within a few minutes was advised that they were on their way (R. 176-177; Exh. 177, pp. 14a and 15, Tr. 1012-14, 1023-26, 1045, 1122, 1128, 1129, 1279-1280, 1962).

At 3:00 p.m., Evans advised Floe that the fire was spotting ahead out of control of his men and equipment at the scene. At 3:15 the Rayonier locomotive arrived at the fire with its crew and two Forest Service men which it picked up en route. In the meantime Evans, having been advised by Floe that more men were coming, went toward Camp One to direct men and equipment to the fire. En route he met a P.A.W. crew of seven men with hand tools and sometime around 3:30 a State crew of seven or eight men arrived. About 4:00 p.m. Rayonier's crew of twenty-five men reached the fire site. By 5:00 p.m. two Fibreboard bulldozers, a P.A.W. locomotive, four Rayonier hand pumps, and at least fifteen additional men were on the fire (R. 177; Fdg. X, R. 233; Exh. 177, pp. 15, 16, 19 and 20; Tr. 1027-30, 1152-54, 1288, 1557).

When an experienced Forest Service employee arrived at the Station, Floe left for the fire, arriving at about 4:30. At this time the fire was in the second growth sapling timber on Camp Creek Ridge (Exh. 177, p. 20).

At about 6:00 p.m. two portable pumps were placed in Camp Creek and a crew of Rayonier men pumped water on the fire throughout the night. By nightfall

the fire covered an area of about 60 acres. By this time the wind had died down; it was quiet, and some fog had settled. Evans left the fire between 9:00 and 9:30, returning to Snider Station where Forest Service men were in conference developing plans and organization for fighting the fire on the next day (Fdg. X, R. 233; Exh. 177, p. 21, Tr. 844-47, 1833).

The fire did not change much during the night. On August 7, at about 4:00 or 4:30 a.m. Evans and a crew of fourteen men arrived at the fire, and a National Park Service crew of six or seven arrived at the same time and place. These men, together with twenty from Fibreboard, and two bulldozers with men to operate them, a power wagon and jeep with water tanks, and two or three portable pumps and hoses out of Camp Creek made up Evans Division III on the fire. This Division on the west and south sides, together with Division II extending easterly and northerly and Division I along the north and west sides, completely encircled the fire area. On the morning of the 7th there were about 165 men on the fire plus sixteen overhead (Exhs. 66, 177, pp. 21-22; Tr. 1066-72, 1095, 1184-87, 1468).

A fire line substantially all the way around the fire was completed prior to 2:30 p.m. on August 7. At that time a stiff breeze arose, driving the fire over the lines through the air and out of control. Under the influence of the topography the fire went so fast that it was not possible to stop it. It went uphill some 200 feet in about five minutes; and it spread to the south and west over a 1600-acre area (Tr. 623-28, 1074-78, 1196, 1419-20, 1474-9, 1750-1).

While there is some conflict in the testimony as to whether or not a fire line should have been built on the night of August 6, experienced men who were familiar with the site, and experts who had experience in the area with night fire fighting, agreed that because of the location of the fire in sapling timber and the characteristics of the terrain, night fighting here would have been hazardous for the men, and good judgment dictated that it not be done (Tr. 844-45, 1585-7, 2098, 3442, 3598, 3706-9, 3774-80, 4038-39).

The fire was contained and controlled on the 1600-acre area by August 10, 1951. At that time the fire line had been completed around the perimeter and a secondary line was constructed along the west boundary of the area and about 600 feet from the first line. There were old logging landings in the 1600-acre area, two of which on the westerly side thereof have been designated throughout this action as L-1 and L-2. L-1 was adjacent to a gravel pit and had little or no debris on it (R. 177; Fdg. XI, R. 233; Exh. 177, pp. 22 and 23; Tr. 1323-26).

From August 11, to September 19, 1951, mop-up work was carried on in the 1600-acre area. Work was done particularly on a 50-foot wide strip inside the perimeter to get this strip "dead out." A day crew was on throughout this period and smokes were put out whenever they appeared. L-1 and L-2 continued to show smoke from time to time. About 2:30 p.m. on September 13, two fire spots appeared on the westerly side, one on the line and one just over the line. A crew and tanker extinguished the fire that night (Tr. 1096-

1101, 1105-9, 1490-6, 1500-2; R. 177-178; Exh. 177, pp. 23-24).

Throughout this period there were days when no smokes appeared; and apart from L-1 and L-2 and one other smoke, there were no smokes for five days prior to September 20. In an area such as this, fires can smolder without visible smoke, and it is almost impossible to put out such fires entirely. They have been known to smolder throughout the winter and break out in the spring. Officially this fire was declared out on December 15, 1951, but it flared up in 1952 (Tr. 882-3, 1101-3, 1503-13, 2662).

Some time between midnight and 4:00 a.m. on the morning of September 20, 1951 "an extraordinary concurrence of high temperature, low humidity and gale-force wind" caused hidden embers to burst into flame inside the 1600-acre area and to cross or jump the fire lines. The fire quickly spread to inflammable material to the west of the area; and from there it moved rapidly and at times by great jumps for a distance of twenty miles in a southwesterly direction to and within the Town of Forks (R. 178; Fdg. XII, R. 233-234; Exh. 177, pp. 25 and 26).

The fire was first seen about 3:15 a.m. on the morning of the 20th by a State Service Lookout. He called the State Warden, who drove to the westerly edge of the 1600-acre area, arriving about 4:00 a.m. At the point where he stopped there was solid fire in front of him. By 5:00 a.m. the fire had jumped through the air to Bigler Mountain, a distance of two or three miles, and within a few minutes it jumped from there to Fan-

stock Creek, a distance of about six miles (Tr. 697, 912, 1704-8, 1716-20).

The State Lookout who first saw the fire estimated the wind at that time at about 40 miles per hour; and the State Warden estimated it at 32 to 38 miles an hour. Fibreboard's logging manager, in the many years that he had been in the area, had never known an east or northeast wind to blow that hard in September. Another witness estimated it at 30 to 45 miles per hour, characterizing it as "terrific", and still another had seen nothing like it in the area during a fire season since 1913 (Tr. 1743, 2104-5, 3211-15, 3290, 4401).

September 19th, the day preceding the breakaway, was a Class 3, or just average, fire danger day, and the evening forecast for the next day gave no indication of the weather which actually occurred (Tr. 2070-75, 3318-24). All of the damages for which appellants seek recovery herein were caused on and after September 20, 1951, following escape of the fire from the 1600-acre area (R. 178).

Although the district court found that P.A.W. and the United States failed to use ordinary care in maintaining the Railroad right-of-way in a reasonably fire safe condition, it also found that it had not been "established by a preponderance of the evidence that such failure to exercise ordinary care proximately caused or contributed to the start or subsequent spread of the Heckleville fire." (Fdg. XIII, R. 234.) And although the court found that the United States failed to act as promptly, vigorously and continuously as it was required to do in the exercise of ordinary care in at-

tacking the Heckleville spot fire and attempting to confine it to the 60-acre area, it also found that it had not been "established by a preponderance of the evidence * * * that there [was] any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area" (Fdg. XVI, R. 234-235).

Further, the court found that the plaintiffs had not shown by a preponderance of the evidence that the United States was negligent "in mop-up or other fire-fighting activities after August 7, or in any other particular alleged by plaintiffs" except as heretofore noted (Fdg. XVII, R. 235).

Finally, the court found that the plaintiffs had not sustained their burden of proving by a preponderance of the evidence "that any of the damages claimed were proximately caused or contributed to by any negligence on the part of any defendant herein," and that the "sole proximate cause of the damages to plaintiffs * * * was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (Fdg. XVIII, R. 235-236).

3. *Unsupported assertions in appellants' briefs.* The briefs for the respective appellants contain numerous statements which we believe a reading of the transcript will show to be either unsupported by the record or based upon material taken out of context. Collectively, these statements give what we submit is an inaccurate picture of events and circumstances which may be deemed pertinent on this appeal. For this reason, we set forth here illustrative examples from each of the briefs. In our discussion of the district court's findings of fact, *infra,* we take issue with other statements made

by appellants which we think the record will not support.

The Arnhold Brief

(a) In the course of its discussion (A. Br. pp. 8-9) [8] of events occurring on *August 6,* appellants state (bottom p. 8) that Floe knew that if the fire escaped into the adjacent slash area with a strong wind behind it, there was a good chance that it would burn westerly to or beyond Forks. The record references given for this statement are to testimony of Floe respecting the situation not on August 6 *but on September 20* when the fire was in the 1600-acre area (see Tr. 697-9). There is absolutely no evidence to indicate that on August 6, when merely a spot fire existed, Floe knew that, given strong wind conditions, it might burn westerly to Forks. In fact, on August 6 the wind was blowing in and easterly direction (Tr. 526); and Floe testified that had the fire been left unattended, it would have gone east and southeast (Tr. 738-9).

(b) In discussing the situation which obtained on the afternoon of August 7, appellants quote (A. Br. p. 13) from the testimony of the Forest Service crew foreman Drake. The fact of the matter is that the quoted testimony (Tr. 1567) related to events on the prior day when there had not been a fire line. On August 7, contrary to appellants' assertion, there was a completed fire line wet down on both sides at the point where the fire spotted over the line (Tr. 1275).

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[8] "A. Br." refers to the *Arnhold* brief; "R. Br.", to the *Rayonier* brief.

(c) Appellants assert (A. Br. p. 18) that McDonald, the State Warden, was an eyewitness of the Heckleville fire breakaway. The supplied transcript reference does not support this assertion. To the contrary, the transcript reflects he did not witness the breakaway but was advised of it by the State Lookout at Gunderson after it had occurred (Tr. 1704-5). Insofar as is known, no one witnessed the breakaway.

(d) Appellants (A. Br. p. 19) quote from Exhibit 151, a Forest Service document pertaining to California. Appellants do not note, however, that Exhibit 151 was never received into evidence. See p. a37 of Appendix to *Arnhold* brief.

(e) Appellants suggest (A. Br. p. 28) that the negligence of the Government was in the creation of an unreasonable risk of a fire occurring and escaping to their damage. They state that the district court repeatedly "so characterized the risks" and on page 29 offer in support of that claim, *inter alia,* the observation of the district court that "a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards". This quotation was taken out of context by appellants. The court stated *immediately* after the quoted passage that there "was not even a scintilla of evidence" justifying it to find as a fact that the Heckleville fire "was causally related to the conditions complained of" (R. 268).

(f) Appellants contend (A. Br. p. 29) that it is clear from the district court's findings that the negligence of the United States (and the other defendants) continued at least up to August 10, 1951. But the court expressly found (R. 235) that they had not established

that the United States "failed to use reasonable care in mop-up or other firefighting activities after August 7."

(g) Appellants refer (A. Br. p. 36) to the court's finding that the sole proximate cause of their damage "was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." In an accompanying footnote, they suggest that this finding fell far short of a finding that the weather conditions were extraordinary and unusual, and imply that the court did not make such a finding. In Finding XII, however, the court specifically found (R. 233) that "[i]n the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred * * *".

The Rayonier Brief

(a) Appellant states (R. Br. p. 18) that Floe "did not do one single thing" about the Heckleville fire "until 1:30 p.m." The uncontradicted evidence plainly shows, however, that Floe called the fibreboard timekeeper repeatedly after 1:00 p.m. to find out where the P.A.W. engine was, but without success; that he called the North Point Lookout requesting that he let Floe know when he could see the engine; that he called Evans a number of times before he reached him at 1:30; and that the P.A.W. engine which had been ordered previously would automatically on its return trip pass over and take care of the Heckleville fire (Tr. 746-747, 866, 3429-3434).

(b) Appellant claims (R. Br. p. 19) that prior to 1:30 p.m. Floe relied "exclusively on the hope that the

PAW broken-down locomotive would get repaired and returned to the Heckelville fire." But Floe did not know prior to 1:30 p.m. that the P.A.W. engine had broken down (Tr. 749-751).

(c) The statement (R. Br. pp. 19-20) that Floe did "nothing" between 1:30 and 2:05 p.m. is contradicted by the undisputed testimony that between 1:30 p.m., when Floe directed Evans to go to the Heckleville fire, and 2:00 p.m., he called the Manager of P.A.W. with respect to obtaining a Rayonier engine for the Heckleville fire, and he called Rayonier's camp at Sappho and requested the engine (Tr. 757-759, 832).

This evidence also contradicts appellant's statement (R. Br. p. 20) that "Floe's first affirmative action to get outside help through anyone but the PAW was at 2:10 p.m."

(d) Contrary to appellant's assertion (R. Br. p. 22) Evans did not leave the fire at 3:00 p.m., for an inexplicable reason. The evidence plainly shows that Evans, having been advised that more men had been ordered, went to meet them and direct them to the fire (Tr. 1027-1030, 1047-1049, 1152-1153).

(e) Appellant states (R. Br. pp. 24-25) that a crew continued to pump water on the fire "until 6 or 7:00 p.m." The uncontradicted evidence shows that a Rayonier crew pumped water on the fire throughout the night (Tr. 1274, 1833-1834, 1848-1851, 1874, 3515-3518). This same evidence refutes the claim (R. Br. p. 27) that "not a man or piece of equipment was working on the fire at dawn." In addition, Evans arrived at 4:30 a.m.; a Forest Service crew was on the line at about that time and relieved the night pumper crews;

the Forest Service fire crew foreman Drake got to the fire at 4:30 with 6 or 7 men; and another Forest Service man John Leyh was also there at that time (Tr. 1066, 1074-1076, 1184-1187, 1467-1470, 1659).

SUMMARY OF ARGUMENT

I

The district court found that appellants failed to establish by a preponderance of the evidence that negligence on the part of the Forest Service caused or contributed to the start or spread of the Heckleville spot fire; the presence of fire in the 1600-acre area; or the break away of the fire on September 20. The court also found that the breakaway was caused by the extraordinary and unforeseeable weather conditions that prevailed on September 20. Appellants attack these findings on the basis of a careful selection of isolated portions of the evidence. On the record as a whole, however, the findings cannot be characterized as "clearly erroneous". To the contrary, they have clear support in the testimony and exhibits.

II

It follows from the findings of the district court that no negligence of the United States was a cause in fact of appellants' damage. Under Washington law, the existence of causation in fact is a *sine qua non* of liability.

III

Since the district court found that it was not established that the condition of the right-of-way caused or contributed to the start or spread of the fire, it should

not be necessary for this Court to reach the question of the correctness of the holding of the district court that the United States had a duty to eliminate fire hazards on the right-of-way. Nevertheless, the United States was under no such duty (the maintenance of the right-of-way being the responsibility of the railroad alone), and the district court, therefore, erred in finding any governmental negligence in connection with the condition of the right-of-way.

ARGUMENT

Introduction

The district court has determined that the damage to appellant's property was not proximately caused by negligence on the part of Government employees. The determination was based upon detailed findings of fact made by the court following an extended trial at which many witnesses, both lay and expert, testified and a substantial number of exhibits were introduced. This evidence dealt with every aspect of the origin of the forest fire, the circumstances of its spread and the procedures undertaken by the Forest Service to suppress it. In many respects it was undisputed; in some, however, there were sharp conflicts.

As appellants recognize, the critical findings of the court were:

(1) that it was not established by a preponderance of the evidence that the negligent maintenance of the P.A.W. right-of-way in the area of the Heckleville fire proximately caused or contributed to the start or subsequent spread of that fire (Fdg. XIII, R. 234);

(2) that, although the Forest Service had not exercised reasonable care in its initial attack upon the Heckleville fire, it was not established either (a) that, had such negligence not existed, the fire would have been contained in the 60-acre area or (b) that there was any causal relationship between the negligence and the ultimate existence of fire in the 1600-acre area (Fdg. XVI, R. 234-5);

(3) that the United States was not shown to have failed to use reasonable care in its fire fighting activities, or in any other respect, after August 7 (Fdg. XVII, R. 235);

(4) that in the early morning of September 20, an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred and caused a flare-up of fire inside the 1600-acre area (Fdg. XII, R. 233); and

(5) that the sole proximate cause of the alleged damage to appellants' property was the unforeseeable and fortuitous combination of wind and weather conditions which occurred on September 20 (Fdg. XVIII, R. 235-6).

We show in Point I below that appellants' attack upon these findings as "clearly erroneous" is without merit. While appellants have carefully selected from the evidence isolated bits of testimony favorable to them, on the record as a whole the findings of the court were fully justified, if not required. Even if it could be said that another trier of the facts might have made different findings and drawn other inferences, appel-

lants cannot meet their burden of showing that a reasonable fact finder could not have found as did Judge Boldt; *i.e.,* of leaving this Court on a review of the "entire evidence" with "the definite and firm conviction that a mistake has been committed" *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395.

In Point II, we demonstrate that, under Washington law, the findings compelled the conclusion of Judge Boldt that the United States was not liable for the damage to appellants' property. In Point III we show that, in any event, it is questionable whether Washington law imposed upon the United States an actionable duty to these appellants to maintain the P.A.W. right-of-way.

I

The Challenged Findings of the District Court Are Supported by the Record

A. *Appellants Failed to Establish that the Condition of the Right-of-Way in the Area of the Heckleville Fire Proximately Caused or Contributed to the Start or Spread of that Fire (Finding XIII).*[9]

1. Appellants cannot challenge that there was a total lack of direct proof that a negligent accumulation of combustibles caused or contributed to the start of the Heckleville fire. The fact is that no witness had any actual knowledge of the condition of the right-of-way at the point where the fire started. There was absolutely no testimony that the fire originated in inflam-

[9] While we show here that this part of Finding XIII is supported by the evidence, we argue alternatively in Point III *infra* that the Government was under no duty to maintain the right-of-way.

mable debris, let alone in debris which should have been removed in the exercise of reasonable care.

In this connection, it is to be noted that there was testimony to the effect that, in Section 30 generally, the brush was not as heavy or as close to the tracks as in other areas and the right-of-way was cleared to five or six feet from each side of the roadbed (Tr. 189, 265, 295-6). Further, Evans stated that the fire had started in a cut and that there were no stumps on the right-of-way at that point. He could not recall specifically that there were rotted or discarded ties on the right-of-way within the perimeter of the fire (Tr. 1012-14, 1146-49, 1315-16).

Appellants Arnhold suggest (A. Br. pp. 22-24) that it was not necessary to supply an eyewitness account of the moment of ignition of the fire. In the single Washington case which is cited for this proposition,[10] however, there was ample circumstantial evidence to *permit* the trier of fact to draw the inference that the fire (1) was started by the defendant railroad's locomotive and (2) ignited in debris on the right-of-way. Among other things, the distance from the passing locomotive to the barn was approximately 50 feet; debris covered this whole distance; and there was no indication of a strong wind which might have taken the sparks from the locomotive farther away. 27 Wash. at 513. Moreover, the court stressed that the question was whether the jury was warranted in its findings and that questions of the weight and sufficiency of evidence "is usually, if not always, a question for the jury." *Id.*

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[10] *Abrams* v. *Seattle & Montana Ry. Co.*, 27 Wash. 507.

In this case, of course, there is no dispute that the P.A.W. locomotive started the fire. The issue is confined to whether an excess of combustible matter caused or contributed to that start. Surely appellants cannot seriously suggest that they were entitled to a finding in the affirmative in the absence of evidence that, at the point of origin of the fire, there was combustible matter which should have been removed. At least not where, as here, the record precludes the drawing of any inferences in this regard from the established facts.

Apart from the consideration that the entire right-of-way was not covered with combustible matter, the evidence discloses that 1951 was one of the driest summers on record in the Soleduck Valley. Moreover, grass grows very rapidly in this district. Even when cut in the spring, as is customary on a properly maintained right-of-way, dry grass and similar materials are to be found during the summer and fall. Normal replacement of ties commences about eight years after construction, and from that time approximately 12½ per cent of the ties are in various stages of decay (Exh. 178 A, B, and C; Tr. 3738, 3752-57, 3806-8).

In these circumstances, the district court was plainly right when it observed that it could not be determined from the evidence "with reasonable probability and without inference on inference" whether any excess of combustible material on the right-of-way was actually at the initial point of the fire (R. 184-5). As the court summarized the situation:

> For all that appears in the evidence, considering the extremely dry ground conditions and low atmospheric humidity at the time, the hot droppings

from the engine might well have started a fire in a sound tie of excellent condition or in little wisps of dried grass or similar material to be found on the right of ways of similar railroads in the area at the time of year in question no matter how well kept up with respect of fire precautions (R. 185).

2. No greater merit attaches to appellants Arnhold's attack (A. Br. pp. 25-27) upon the district court's finding that it had not been established that the undue accumulation of combustible matter caused or contributed to the spread of the fire. Appellants have not pointed to any evidence which compelled Judge Boldt to draw their suggested inference that the fire would not have spread as rapidly had there been just the customary (and non-negligent) amount of grasses and other inflammable material in the area.

Appellants place heavy reliance (A. Br. p. 25) on the testimony—much of it by a witness (LeGear) who did not arrive at the scene until after the fire had already spread over a considerable area—to the effect that brush and ties were burning. But the fire was hardly confined to such matter. It also burned through the grass and other material whose presence on and in the vicinity of the right-of-way was found not to be the result of improper maintenance.

More importantly, that brush and ties burned in a fire does not require the conclusion that they were a substantial contributing factor to its spread. What appellants ignore once again is the prevailing conditions in the area—the dryness of *everything* on the ground and the low humidity. Judge Boldt was free to infer,

as he did, that the causative factor of the rapid spread of the fire well might have been these conditions—rather than any specific material that was in its path.

B. *Appellants Failed to Establish that there Was Any Causal Relationship Between the Forest Service Negligence in the Initial Attack upon the Fire and the Ultimate Existence of Fire in the 1600-Acre Area (Finding XVI).*

1. In its amended Finding XVI (R. 234-5), the district court expressly found that appellants had not established the existence of a causal relationship between the negligence of the Forest Service in its initial attack upon the fire and the ultimate existence of fire in the 1600-acre area. Notwithstanding this finding, appellants in both cases lay stress (A. Br. pp. 14, 29, 38; R. Br. p. 60) on a statement in the court's memorandum opinion—issued several months earlier—to the effect that negligence chargeable to the United States did proximately contribute to the spread of the fire to the 1600-acre area (R. 203). As the appellants should be aware, however, the court intended the amended finding to supersede this statement. In the circumstances, appellants Arnhold's citation of it (A. Br. p. 38) to support an unqualified statement in their brief that the court found negligence of the United States caused the spread of the fire to the 1600-acre area was not justified.

(a) The district court's original Finding XV (R. 212) read in pertinent part:

> Whether, or at what time and place, the fire might have been contained or suppressed within

said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. Such failure to exercise ordinary care proximately contributed to causing the spread of the original Heckleville spot fire to the 1600-acre area.

And original Conclusion IV (R. 214) read in pertinent part:

> This negligence proximately contributed to causing the spread of fire to the 1600-acre area.

The memorandum opinion apparently was written at approximately the same time as this finding and conclusion. At three separate places in the opinion, the court made statements similar to those contained in original Finding XV (R. 198, 202, 203).

(b) At the argument on their motions for alteration and amendment of the findings and conclusions, and particularly for the deletion of the finding to the effect that the damage to their property had not been proximately caused by negligence on the part of the Government, appellants called the court's attention specifically to original Finding XV (R. 290). In relevant part, Judge Boldt's response was:

> In my judgment, whether that negligence was the cause of the fire escaping and ultimately being in the 60-acre area and the 1600-acre area, is a matter of speculation.
>
> * * * * *
>
> Now, in my opinion, the Forest Service people were negligent * * *, *but there is no showing that*

there is any causal relationship between that and the ultimate existence of fire in the 1600 acre area.

If anything I have said in the findings seems to conflict with this, it is a matter of mistaken wording or language. I thought I covered it by the clause in paragraph XV which says, "Whether or at what time and place the fire might have been confined or suppressed within said area;" namely, the 60-acre area, "but for such negligence of the Forest Service, is a matter of speculation and cannot be determined as a reasonable probability under the evidence." I believe that completely in my own mind, and I do not in any manner withdraw from it.

Now, if the *last* sentence in that paragraph is to be interpreted as in some manner conflicting with the next preceding sentence which I have just quoted, *I am going to delete it from the findings,* and I see now there is such a possibility of that being so interpreted. (R. 292-293) (Emphasis added.)

In accordance with these observations, the court issued amended Finding XVI (R. 234-235), in which it deleted the last sentence of original Finding XV and substituted the following:

> It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any casual relationship between that negligence and the ultimate existence of fire in the 1600-acre area.

Additionally, the court deleted from Conclusion IV the statement that the negligence of the Forest Service proximately contributed to the spread of the fire to the 1600-acre area (R. 237).

Insofar as the memorandum opinion is concerned, the court amended it to eliminate two of the three statements therein which were to the same effect as the deleted portion of original Finding XV (R. 238-241). Unfortunately, the court inadvertently overlooked, and therefore did not also delete, the third reference in the memorandum opinion to a causal relationship. It is this third reference (R. 203) which appellants seize upon in their briefs.

In short, contrary to the implication left by appellants' briefs, the court found without qualification that the negligence of the Forest Service in its initial attack upon the fire was *not* shown to have had any causal relationship to the later presence of fire in the 1600-acre area. The statement in the memorandum opinion upon which appellants rely, and appellants' arguments based upon the premise that the court found the requisite causal relationship to exist (see pp. 37-60, *infra,*) may properly be disregarded.

2. Finding XVI is amply supported by the evidence.

(a) The fire did not, as appellants Arnhold maintain (A. Br. p. 14), grow "unattended from a spot fire to several acres". When Assistant Ranger Evans arrived at the fire at 2:30 p.m. on August 6, with three men, it was something less than an acre in size (Tr. 1279). At this time Evans, an experienced fire fighter who trained

and supervised suppression crews (Tr. 985-8), considered that he could put out such a small fire with the men he had (Tr. 1045, 1122-3). But this fire kept spotting ahead in a breeze of 10 to 12 miles per hour, and at times stronger, so that in the short period of a half hour following Evans' arrival, it was racing and could not be controlled with the men that he had. Once a fire is running you cannot get in front of it; at best you can attempt to flank it, but the flanking movement cannot be completed until the fire stops running, which is accomplished by a natural barrier or cessation of the wind (Tr. 1014, 1029, 1030-1, 1038, 1041-3).

When suppression crew foreman Drake and another Forest Service man arrived at about 3:15 p.m. on the Rayonier engine with its crew and a tank car of water, the engine stopped on the west side of the fire because it appeared dangerous to go through it. At that time the fire was approximately seven acres in size. It was moving to the southeast, and the wind was picking up pieces from stumps and brush and causing the fire to spot ahead (Exh. 72; Tr. 1443-9).

About 4:30, when Ranger Floe arrived, the fire was already in the sapling timber (Exh. 177, p. 20); and by nightfall it had covered an area of about 60 acres, notwithstanding the fact that within two hours after 3:15 p.m. (when the Rayonier locomotive arrived with its crew and the two Forest Service men to assist Evans' crew) there were on the fire seven P.A.W. men, a state crew of seven or eight men, 25 Rayonier men, two Fibreboard bulldozers, four hand pumps, and at least 15 additional men (R. 177, Exh. 177, pp. 15, 16, 19 and 20; Tr. 1027-30, 1152-4, 1288, 1557).

The fire did not change much during the night (Tr. 1056). A 15-man crew pumped water on it throughout the night from two pumps which had been placed in Camp Creek (Tr. 1274, 1833-4, 1848-51, 1874, 3515-18). Apart from this, there was no fire fighting on the night of August 6, because in Floe's judgment building fire line in the rough terrain of the sapling timber at night would have been hazardous for the men. While some of appellants' witnesses were of the opinion that the fire line should have been built on the night of the 6th, experienced fire fighters with personal knowledge of the area agreed with Floe's judgment (Tr. 844-45, 1585-7, 2098, 3442, 3598, 3706-9, 3774-80, 4038-9).

At 4:30 on the morning of August 7 Evans arrived at the fire, and about the same time a Forest Service crew was on the line and relieved the all-night pumper crews. Both Drake, the fire suppression crew foreman, with 6 or 7 men, and John Leyh, another Forest Service man, were also there at 4:30 a.m. A total of 165 men plus 16 overhead made up the fire-fighting force on the 7th, and, grouped into three divisions, they were spaced out to encircle the fire area. Equipment included, in addition to hand tools, bulldozers, a power wagon and a jeep with water tanks, and three portable pumps, and tankers with capacities up to 1,500 gallons of water (Exh. 66; Exh. 177, pp. 21-22; Tr. 1066-72, 1077, 1095, 1184-7, 1468-70). A bulldozer fire line had been completed around Evans' division by about 12:30 p.m. and by 2:30 p.m. the line had been completed substantially around the fire. In addition, Evans' division line which was about 3,000 feet long, had been wet down except for the westerly 200 feet. Until about noon

it was cool and there was no wind (Tr. 1069-75, 1275, 1473, 1545-7).

About 2:30 p.m. the wind sprang up causing the fire inside the line to start burning briskly and throwing sparks, pieces of trees, small limbs, and needles through the air over the completed line in Evans' division. Fires spotted 300 to 400 feet from the line and then blew under the influence of the topography. There were hundreds of spot fires all at once. The fire moved so fast that in about five minutes it went approximately 200 feet up a hill. It was clearly not possible to stop it. By 3:00 p.m. Evans received orders to pull out, and by 5:00 p.m. Drake and other men were ordered out. During the next three days the fire spread south and west over the 1600-acre area (Tr. 623-28, 848-9, 1074-8, 1196-8, 1275-6, 1419-20, 1474-80, 1545, 1571-3, 1750-1).

(b) Appellant Rayonier points (R. Br. 41-43) to the various estimates given by several witnesses of the number of men who could have brought the fire under control at different times during the afternoon of August 6. It also cites a comment by Chief Fire Control Officer Gustafson which was contained in a report written after consideration of the fire by the Forest Service Board of Review.

Rayonier necessarily assumes, of course, that the district court found that the Forest Service was negligent in not employing that number of men mentioned in one or another of the estimates. It is far from clear, however, that the district court was of that view. The finding of negligence was in most general terms—that Floe and his subordinates had not acted "as promptly, vigo-

rously and continuously as they were required to in the exercise of reasonable care" in initially attacking the Heckleville spot fire and attempting to extinguish it. It was not found that Floe knew or should have known that any specified number of men would be needed.

In this connection, as Assistant Ranger Evans indicated (Tr. 1045), all of the estimates were the product of hindsight judgment. The court itself cautioned against attaching too much weight to such judgments (R. 195-196):

> It is difficult for any person, whether an expert forester experienced in firefighting or not, in appraising such a situation long after the event, to avoid hindsight judgment and opinions predicated on what actually happened as we now know it. Every person responsible for decision and action in such a situation is entitled to have his conduct judged in the light of the situation as it might have appeared at the time to one exercising reasonable care, with full allowance for all of the difficulties and limitations under which the actor was required to make decisions and take action. Under Washington law one required to act in an emergency not caused or contributed to by his own lack of reasonable care will be absolved of a charge of negligence if he acted as a reasonably prudent person might have acted in the same circumstances even though it later appears that the actions taken were not the safest and best available or those which other reasonably prudent persons might have taken in the same situation. * * *

In any event, the district court was not compelled to accept the opinion evidence as conclusively demonstrating that the use of a particular number of men would have necessarily resulted in the control of the fire. Indeed, we submit that there was an ample basis for the court to attach little weight to the estimates.

Gustafson's estimate, for example, was not an unqualified one. Rather, his statement was that, if certain action had been taken, it "may have resulted" in the control of the fire, "at least there was this chance" (see R. Br. p. 42). Moreover, so far as the evidence shows, he had no personal knowledge of conditions in the area. As Ranger McCullough testified, Gustafson (who was located in Washington, D. C.) was talking about things he was a long way away from, and the men in the field did not always agree with him (Tr. 3683-4).[11]

Charles Cowan did not testify (R. Br. p. 42) that seven to twelve men "could have suppressed" the fire. Rather, he said that a crew of ten to twelve men "could have probably" suppressed it if Floe had put such men on standby at 12:30 p.m. on August 6, and then put them on the fire at 1:00 p.m. (Tr. 2393). But it must be remembered that Floe did not even know about the Heckleville fire until 1:00 p.m.

H. H. Jones (R. Br. p. 42) admitted that he had never been in a dispatching position on a fire (Tr. 2937); he had had no experience getting loggers to fight

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[11] Floe's estimate that ten men could have suppressed the fire was also qualified. It was made solely in terms of the situation at 1:00 p.m. Floe could not state categorically how many men it would take to suppress a fire of one acre. In his opinion, even a one-half acre fire under extreme conditions might require 40 to 50 men (Tr. 608-10, 744).

forest fires (Tr. 2941); and he had had no experience building fire line in sapling timber at night (Tr. 2944). Further, while his responses were theoretically based upon facts given him in the hypothetical question, some of his time assumptions in the explanations of his opinions were inconsistent with that question, and were contrary to the facts (Tr. 2584-6). At times he even went outside of the assumed facts and took into account evidence which he had heard while he was in the court room (Tr. 2590-1). Upon objection and motion to strike by P.A.W. counsel, Judge Boldt stated that he would take this into consideration in weighing the testimony (Tr. 2591). Finally, Jones admitted that his standards were higher than those of a reasonable prudent forest ranger, and that in all of his answers he used such higher standards (Tr. 2975, 3005).

Walter Schaeffer (R. Br. p. 43) had no fire-fighting experience in the Olympic Peninsula and had never fought a fire in timber such as that on the Peninsula; he had never been in a position where he had to weigh factors involved in supplies of manpower for a fire; he had never served as a dispatcher; he did not know anything about weather conditions on the Olympic Peninsula; and he did not know local practices concerning the calling of crews, or night fire fighting (Tr. 2685, 2691-3, 2709, 2718-20, 2734, 2749).

Norman Jacobson's testimony is cited with respect to what a reasonably prudent ranger would have accomplished (R. Br. p. 43). But he admitted that he considered his judgment better than that of a reasonably prudent ranger, and that his superior knowledge

and better judgment had "crept into" his answers (Tr. 3150-2).

Moreover, in expressing their opinions that the fire could have been extinguished short of the 1600-acre area, appellants' expert witnesses had differing opinions not only as to the number of men required, but also respecting types and amounts of equipment needed (Tr. 2393, 2436, 2445, 2592-4, 2651, 2946, 3056).

In all of the circumstances, we submit that it was for the trier of fact to determine what weight should be attached to the different opinions expressed by witnesses of varying qualifications on a question which, particularly in view of prevailing conditions in the Heckleville area, necessarily involved a considerable amount of conjecture. The weight that was given by Judge Boldt is reflected in his observation:

> In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period. I will readily agree that one person might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time. (R. 292.)

C. *Appellants did not Establish that the United States Had Failed to Use Reasonable Care in its Fire-Fighting Activities, or in any Other Respect, After August 7 (Finding XVII).*

Finding XVII is attacked solely by appellants Arnhold. Appellant Rayonier, while asserting that it does not consider the finding correct, has not included it in its specifications of error and assumes its correctness for the purpose of argument (R. Br. p. 31).

1. Appellants Arnhold's assertion (A. Br. p. 32) that the negligence of the Forest Service continued at least up until August 10, 1951 is not supported by the record. Indeed, two of appellants' own witnesses expressed the opinion that the Forest Service had done excellent fire fighting on the 8th, 9th and 10th of August until the fire was controlled on the 1600-acre area (Tr. 2905, 3068).

2. With respect to the mop-up operations following the control of the fire on the 1600-acre area, appellants Arnhold claim negligence on the part of the Forest Service in "letting known fires continue to smolder"; in "failing to work on fire suppression during the two days it rained"; and in "progressively abandoning mop-up after September 1, 1951 in the hope that heavy rains would complete the mop-up" (A. Br. pp. 15-16). None of these contentions has merit.

The fire was controlled in the 1600-acre area on August 10 or 11 (Tr. 635-636). A fire line completely encircled the area, and on the west side thereof a secondary caterpillar line 10 to 12 feet wide was built about 600 feet distant from the primary line. Forest Service men worked at, and thought they had accomplished,

putting the fire completely out in a strip 50 feet wide just inside the fire line all around the perimeter of the area. On August 9 when a Forest Service regional officer inspected the line, he found it black and satisfactory (Tr. 1323-25, 2100, 4070-1).

There is no fixed formula for the number of men required on mop-up; it is dependent upon the condition of the fire at the particular time (Tr. 3679). But, contrary to appellants' assertion, there was not a progressive abandonment of mop-up after the first of September. From September 1 to 10 there were never less than five men, and from the 10th through the 19th there were from two to five men as conditions dictated, and there were also two Fibreboard men with a truck tanker (Tr. 1490-1502, 3679). While there is some conflict in the testimony as to whether men should have worked on mop-up on the two days when it rained, normally work is not done on rainy days when fire is in the mop-up stage. Such work is no more effective in extinguishing the fire than on any other day; and smokes are not as readily seen during rain as on dry days (Tr. 3823-27).

Certainly the Forest Service did not, as appellants imply (A. Br. p. 16), do little or nothing on mop-up and merely wait for rain. In this connection appellants requested that the district court make a finding that: "Between August 10 and September 20, 1951, Forest Service personnel attempted to extinguish a 50-foot strip around the perimeter of the 1600-acre area and kept the 1600-acre area under surveillance in the daytime, suppressing smokes and flareups as they occurred, and awaited the usual rains of late September and October to extinguish the remaining sparks and

smoldering fires" (R. 220). In rejecting this request, Judge Boldt said in part:

> You say it as though the man were standing there looking at the sparks, and he thought, "Well, I won't go out and put it out but I will wait until the rain comes in the fall." That wasn't the fact picture here.
>
> The fact picture as I understand it and as I said in my memorandum decision, there were periods of days on end when there were no smokes at all. This gives the inference that they knew that there was fire there and they just didn't go and put it out but sat around waiting for the rain, and if that is the inference that is intended to be put, that is unfair.
>
> * * * * *
>
> * * * I don't like the way that it is phrased. In my judgment it is not a true picture of it, although I am not being critical, of course. But in my mind the way this is phrased, it doesn't fit my conception of what they were doing out there. (pp. 261, 263.)

The men on mop-up watched the entire area. As smokes appeared, they put them out, and they never returned to the station in the evening without having put out any fire of which they were aware. L-1 on the west side of the fire area smoldered almost continuously, and L-2 showed smokes from time to time. However, the prior cleaning of both of these landings was an outstanding job. So far as fire hazard was con-

cerned, L-1 was safer than other parts of the area. It was used as a gravel pit; there was no debris on it, and such logs and debris as existed were beyond the gravel pit area; it was about as fireproof as it could be made. Except for the smoldering in the landings, there were several days when one could drive all over the area and find no smokes. With the exception of the landings and one smoke near the river, there were no smokes in the area for five days prior to September 20 (Tr. 851-5, 1331-2, 1329-30, 1503-13, 1539, 1617, 2453, 3799, 3802).

On the morning of the 13th of September Leslie L. Colvill, a Forest Service officer from the Regional Office, inspected parts of the perimeter of the fire area and considered that mop-up work was progressing satisfactorily. From a vantage point on the highway near Heckleville he looked back upon the area and could see no smoke (Tr. 4081). About 2:30 that afternoon two small fires occurred, one spot right on the line and the other across the line in a log. These fires were reported out some time between 5:00 and 6:00 p.m., but the fire flared up again before 7:30 p.m. A crew was summoned and the fire was put out by 2:30 a.m. (Tr. 1108-9, 1217-20, 1222-3). Insofar as the record shows, this was the only flareup between August 11 and September 20, 1951.

There was no night patrol on the fire on the night of September 19. But there is substantial credible evidence that on the basis of the condition of the area, with no smokes for five days except for those noted, and considering the weather forecast on the evening of September 19, no need for such a patrol appeared; and it was not customary under such circumstances to

have one. Further, there is credible evidence that, in view of the nature of the breakaway on the morning of the 20th, a night patrol would not have been effective (Tr. 1597, 1773-5, 1795, 2096, 3599-3600, 3781-4, 4039-41, 4084, 4406). Although appellants' expert witnesses testified that a night patrol should have been used, they all differed in their opinions as to how many men and what type of equipment there should have been (Tr. 2526-7, 2667, 2957-8, 3070).

The nature of the breakout of the fire during the early morning hours of September 20, including its intensity and rapid spread by great jumps through the air, the "extraordinary" weather conditions which caused it, and its unforeseeability are discussed below. While there is no doubt of the fact that by 4:00 a.m. on this morning there was "solid fire" in an area on the west side of the 1600-acre area (Tr. 1704-8), there was insufficient evidence to show from what point the fire came. Although some witnesses had an opinion as to the place of origin (Tr. 1611-12, 2406, 4089), others who saw the fire even at a very early hour testified that they had no idea of the point of origin (Tr. 653-54, 1290). In any event, the preponderance of the evidence shows that it did not come from L-1 (Tr. 1535-37, 2082-3, 4089, 4299-4300).

Although the fire came from some point within the 1600-acre area, this does not mean there was negligence on the part of the Forest Service in the mop-up. This area was rugged terrain; some places were so steep that men could not climb up or down; and there were rock shoots, rock canyons, and slides over and around which

the men had to work. Mop-up on the Olympic Peninsula is more difficult than in any other part of Forest Service Region Six which comprises the States of Washington and Oregon (Tr. 1100-1, 3993-6).

Fires may continue to burn in deep underground roots in such an area despite the best efforts of experienced fire fighters to extinguish them. Even very heavy rains may be insufficient to put them out, and they have been known to smolder throughout the winter and break out in the spring. At least two of appellants' witnesses so recognized. This is precisely what happened to the Forks fire. It was officially declared out on December 15, 1951, and flared up in the spring of 1952 (Tr. 883, 2406, 3088, 3108, 3153). That Judge Boldt had these facts well in mind is apparent from the following:

> In a fire-swept forest area of such proportions and topography it is a practical impossibility to find and put out every last vestige of fire smoldering in buried roots, logs, turf and debris. In such a situation it is common and accepted practice on the Olympic Peninsula and in other Northwest forest regions to keep the area within fire lines under surveillance by daytime patrol and to suppress smokes and flareups as they occur, awaiting the heavy rains of late September and October for complete quenching of every last spark. This is not quickly or readily accomplished even with the heavy and frequent rainfall of fall and winter in this near-coastal region (R. 198-199.)

D. *The Extraordinary Concurrence of High Temperature, Low Humidity and Gale-Force Wind on September 20 Caused a Flare-Up in the 1600-Acre Area (Finding XII) and These Weather Conditions Were Unforeseeable (Finding XVIII).*

In attacking the district court's findings respecting meteorological conditions on September 20, appellants Arnhold make several statements (A. Br. pp. 38-41) which we believe are not supported by the record. There is no evidence, for example, that "like east winds and weather conditions" occurred six days before (A. Br. p. 38). And while appellants claim there that "no weather station in the immediate area of the Heckleville fire, or anywhere else," recorded any wind in excess of that forecast, the fact is that the forecast was for winds from 12 to 16 miles per hour on September 20, and at 8:00 a.m. on that day winds of 25 miles per hour were recorded at Crescent Lake about 10 miles from the fire area (Tr. 2206).

Further, the testimony of appellants' weather expert was based in part upon so-called "aids" for estimating fire weather conditions (Exhs. 168, 168-A; Tr. 2177-80, 2183-6), which aids were merely being tested in 1951 at designated stations which did not include Snider Station (Tr. 3328-9). Also, this expert's estimate of wind velocity in the Soleduck Valley on the night of September 19-20 was based in large measure upon records from Tatoosh Island (Exh. 167; Tr. 2212-15); but the surface winds at Tatoosh are not at all representative of winds in the Soleduck Valley (Tr. 3339-40).

Of far greater importance in connection with all of appellants' factual assumptions concerned with the wind which combined with other unusual weather conditions to cause the breakaway of the fire during the night of September 19-20, no station in the Soleduck Valley made wind recordings on that night (Tr. 2199-2201, 2213). Consequently, the district court necessarily relied upon the testimony of persons who were at or near the fire between 4:00 a.m. and 8:00 a.m. on that morning and described the wind at that time.

Appellants refer (A. Br. p. 40) to an estimate of 10 miles per hour for the wind on that morning. But the witness who made the estimate characterized it as an "outright guess", and, in addition, he was speaking as of 3:30 a.m. outside his home in the Town of Forks, which at that time was far removed from the scene of the fire (Tr. 1665-6). James Anderson did not testify, as appellants state (A. Br. p. 40), that he "would expect" winds of 20 to 25 miles per hour in August and September. Rather, while agreeing that such winds "do occur," he went on to indicate that this was not a usual occurrence (Tr. 3236-37). Again, Fibreboard's manager did not estimate the wind speed on the morning of September 20 "at 25 miles per hour" (A. Br. p. 41). After testifying that there was a "very high wind blowing" (Tr. 4436) and stating that it was "very unusual weather", he estimated with some apparent reluctance that the wind was a "minimum of 25" miles per hour (Tr. 4439).

That the wind was "extraordinary" in its intensity and duration and for the time of year in which it occurred is attested by a wealth of evidence. State Dis-

trict Warden McDonald, who was at the fire on the morning of September 20 about 4:00 a.m., estimated the wind at that time at 32 to 38 miles per hour (Tr. 1743). On the so-called Beaufort Scale, winds of 39 miles per hour and over are gale-force winds (Exh. 164). The Forest Service fire suppression crew foreman estimated it at 25 to 31 miles per hour at 4:30 a.m.; and Floe, who had been District Ranger at Snider Station for many years, said that it was one of the strongest winds he had ever seen and that it blew constantly from 3:45 a.m. until noon (Tr. 695-6, 911).

Petrus Pearson, Fibreboard's logging superintendent, who had lived in Western Washington for 49 years (Tr. 2078), believed that the wind that morning was 30 to 35 miles per hour (Tr. 4498); and as to the nature of the wind, he said:

> I had a tin hat on. * * * I had to hold on to that to keep it on. The wind was picking up sharp bits of gravel and throwing it in your face with a stinging sensation, and there was things rolling around on the road, and the dust was flying. * * * I never saw a northeast wind blow that hard or an east wind. (Tr. 2104.)

Carl H. Russell, who was with the Washington State Department of Forestry for 24 years, who had worked in fire control, and who had been a District Supervisor on the Olympic Peninsula, stated that not since 1913 had he seen as bad a fire day when the wind blew as hard and long (Tr. 4401). The State Lookout at Gunderson who, as far as is known, was the first person to see the fire, and who reported it at 3:15 a.m. on the

20th of September, estimated the wind at 40 miles per hour and said that the lookout tower was "rattling and weaving" (Tr. 3291).

James Anderson, a former Forest Service employee and thereafter a timber cruiser for appellant Rayonier, had had several years experience taking wind recordings on an anemometer. He testified that at two points about nine or ten airline miles southwest of the 1600-acre area, to which he went between 5:30 a.m. and 7:00 a.m. on the 20th, one in the Calawah area, and the other at Hyas Ridge (Exh. 108), the wind was 35 to 45 miles per hour and "much stronger at times". He characterized the wind as "terrific"; and he was concerned that it would blow trees across the road so that he could not get out of the area before the fire reached him. This was the strongest wind he had ever seen on the Peninsula during a fire season (Tr. 3209-13, 3215, 3218-20, 3230-31).

In addition to this testimony, the fact that this wind caused the fire to blow through the air and spot at points three or four air miles distant is evidence of its unusual nature (Tr. 1604-5).

There is no evidence in the record to contradict the credible testimony of these eyewitnesses, or to show that any comparable dry east wind was known in this area during August or September for a period of many years preceding 1951. Annual fire weather reports for the State of Washington which were made by appellants' weather expert over a number of years between 1930 and 1947, failed to reveal any such serious east winds in September as are here described (Tr. 3340-41).

Neither is there any evidence in the record to show

that the combination of weather conditions which existed on September 20 was to be expected or was reasonably foreseeable. The weather readings at Snider Station for Wednesday, September 19, 1951, showed a Class 3, or just average, fire weather day (Tr. 3317). The last fire weather forecast for that day, which was made in the early evening, read as follows:

> Olympic—Mt. Baker Districts: Thursday: Patches of fog during early morning, otherwise high scattered to broken clouds. Little change in temperature. Humidity about 10% lower, with minimum near 30%. Winds northeasterly 12 to 16 exposed areas. (Exh. 44; Tr. 1596.)

Under accepted forecast terminology which has been standard since about 1933 (Exh. 104; Tr. 3325), the weather predicted was to be expected at the highest fire weather time, which was the middle of the afternoon on Thursday, September 20, 1951. Had the forecast been applicable to the night of September 19-20, the forecaster would have used the word "tonight" instead of "Thursday." In other words, the highest wind velocity of 16 miles per hour and the lowest humidity of about 30% were forecast to occur mid-afternoon on the 20th (Tr. 1596-7, 3322-3, 3379). From the forecast of fog one would assume saturated air at all levels in contact with the ground, a cool night, and no appreciable wind, since wind and fog do not occur together (Tr. 1594, 1596-7, 1938, 3322-3, 3379-80).

Normally, relative humidity goes up starting around 5:00 p.m. and reaches its highest point sometime in the early morning. Actual readings at Fibreboard Camp

One for the 17th of September showed humidity above 90% for 12 to 14 hours, and on the 18th around 90% for about 10 hours. There was nothing alarming therefore in the forecast on the evening of the 19th, and there was nothing whatever in it to indicate the weather conditions which occurred during the early morning hours of the 20th. But on the 19th, the humidity, after rising to about 70% at 9:30 p.m., dropped continuously after 10:00 p.m. until it reached its low point at midday on the 20th (Exh. 40; Tr. 2074-6, 3404-5, 3784-6, 4113-15, 4188); and at the same time the wind arose.

In sum, the district court was fully justified, if not required, to find that there was "an extraordinary concurrence of high temperature, low humidity and gale-force wind" (Fdg. XII, R. 233), and that such weather conditions were "unforeseeable" (Fdg. XVIII, R. 235-236).

II

Under the District Court's Findings, the Government's Negligence Was Not a Cause in Fact of Appellants' Damage

1. It is of course basic to the law of torts that an act of abstract negligence cannot support the imposition of liability: it must be shown that the damage complained of was proximately caused by the negligence. *Prosser on Torts* (2d ed., 1955), pp. 218-220. The Washington Supreme Court has defined proximate cause as "that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the [damage], and without which that [damage] would not have occurred". *Squires* v. *McLaughlin,* 44 Wash. 2d 43, 47, 265 P. 2d 265; *Burr* v. *Clark,* 30 Wash. 2d 149, 157, 190 P. 2d 769.

That court has also indicated that, before any question of proximate cause can arise, it must be established that the negligence was the cause in fact. As it explained in *Eckerson* v. *Ford's Prairie School Dist. No. 11,* 3 Wash. 2d 475, 482, 101 P. 2d 345:

> There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
>
> An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted "but for" the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the "cause" in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause.

This holding was quoted and applied recently in *Guerin* v. *Thompson*, 53 Wash. 2d 515, 335 P. 2d 36.

In this case, under these principles, the district court was not called upon to determine, and did not decide, whether the weather conditions existing on the morning of September 20 were an intervening, superseding cause or a concurring cause of appellants' damage. For, at that time, no negligence of the Government was operative for the weather conditions to supersede, or with which they could combine, to cause that damage.

This follows from the court's findings, discussed in Point I above, that (1) the condition of the P.A.W. right-of-way did not contribute to the start or spread of the fire; (2) the negligence of the United States in its initial attack upon the fire did not contribute to the presence of the fire in the 1600-acre area; and (3) there was no negligence on the part of the Forest Service during the mop-up operations in that area. What this means is that the presence of fire in the 1600-acre area on the morning of September 20 was in no wise attributable to any negligence of the Government; stated otherwise, there was no continuing risk created by any negligence of the United States in existence at that time.

2. In view of the foregoing, appellants' lengthy discussion of such concepts as continuing risk and intervening, superseding and concurring causes has no relevance here. All of appellants' arguments based upon these concepts presuppose what the district court has found as a fact *not* to have been established: that negligence on the Government's part was responsible for the presence of the fire in the 1600-acre area and, therefore, was an actual cause of the damage to their property. This is amply reflected by the fact that, in all of the cases which they cite, the defendant's negligence was an actual cause of the damage and the question was simply one of whether the actual cause was also a proximate cause. See *e.g. Johnson* v. *Kosmos Portland Cement Co.*, 64 F. 2d 193 (C.A. 6) (defendant's negligence in failing to clean an oil barge created a continuing risk of explosion which was touched off by lightning); *Theurer* v. *Condon*, 34 Wash. 2d 448, 209

P. 2d 311 (a fire hazard created by the negligent installation of an oil burner continued until the act of another concurred therewith to cause the damage); *Seibly* v. *City of Sunnyside*, 178 Wash. 632, 35 P. 2d 56 (defendant's negligence in failing to place a barrier or warning sign where it was burning materials along the highway concurred with another's negligence to cause plaintiff's damage); *Tope* v. *King County*, 189 Wash. 463, 65 P. 2d 1283 (negligence of the defendant in putting surface waters on land combined with an unprecedented flood to cause the damage); *Teter* v. *Olympia Lodge*, 195 Wash. 185, 80 P. 2d 547 (negligence of defendant in permitting wall of a burned out building to remain standing created a continuing risk with which wind concurred to cause plaintiff's damage); *Anderson* v. *Minneapolis, St. P. & S.S.M. Ry. Co.*, 146 Minn. 430, 179 N.W. 45 (defendant was responsible for a fire with which wind concurred to cause the damage).[12]

The same erroneous presupposition that governmental negligence was a cause in fact of the damage underlies appellants' argument on foreseeability, as well as the suggestion of appellant Rayonier (R. Br. p. 57) that the Government's position is that the United States should be exonerated because the damage was "too remote in time and space". Unless it is established that the negligence was an actual cause, foreseeability and remoteness, as these terms are used by appellants, do not enter the picture. Put another way,

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[12] See comment on this case in *Prosser on Torts* (2d ed., 1955, p. 221, fn. 19).

only after there has been a showing of actual cause must it be determined whether, in the words of the Washington Supreme Court in the *Eckerson* case, "this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause." See p. 56, *supra.*

While the district court did not articulate these considerations, it clearly recognized them. Its finding that the adverse weather conditions during the early morning of September 20 were extraordinary and unforeseeable was solely in the context of appellants' assertion that the Forest Service had been negligent during the mop-up period. Any doubt in this regard is dispelled by the discussion in the memorandum opinion (R. 199-201) of appellants' claim that Forest Service negligence during the night of September 19-20 led to the break out of the fire from the 1600-acre area. Further, the court's finding that the unforeseeable adverse weather conditions were the sole proximate cause of the damage was not based upon any theory that these conditions had superseded prior governmental negligence. Leaving aside the fact that there was no such negligence to be superseded as a cause, the court expressly stated in its memorandum opinion (R. 201) that it was not necessary to consider "whether the strong wind, the high temperature, the low humidity, or the concurrence of the three during the night in question, was an Act of God as that term is meant in law."

In sum then, virtually in its entirety appellants' proximate causation argument, as well as their contention that Judge Boldt misconstrued Washington law, rests upon a state of facts other than that found. On the facts as found, the negligence of the Forest Service was not a cause in fact of the damage since it did not contribute to the start of the fire; its spread to the 1600-acre area; or its flare up on September 20. Not being a cause in fact, it could not be a legal or proximate cause. *Eckerson* v. *Ford's Prairie School Dist. No. 11, supra.*[13]

III

The United States Had No Duty to Appellants to Maintain the P. A. W. Right-of-Way in a Fire-Safe Condition

While, in view of the above, we do not think this Court need reach the question, we submit that the district court's conclusion (R. 236) that the United States was negligent in failing to maintain the P.A.W right-of-way in a reasonably fire-safe condition was in error. In Washington, as elsewhere, one of the elements of actionable negligence is the existence of a duty to conform to a standard for the protection of others. *McCoy* v. *Courtney*, 25 Wash. 2d 956, 963, 172 P. 2d 596; see

[13] While it is unnecessary to discuss the point, we do not concede, of course, that, had the district court found that negligence on the part of the Forest Service had contributed to the spread of the fire to the 1600-acre area, that negligence could be regarded as the proximate cause of the damage. Since the fire was contained within the 1600-acre area, the sole proximate cause of the damage would still have been that factor which occasioned its flare up onto appellants' property—namely, the unexpected and unforeseeable adverse weather conditions. Cf. *Rayonier Incorporated* v. *United States,* 225 F. 2d 642, 644.

also *Prosser on Torts* (2d ed., 1955), p. 165. Insofar as the maintenance of the right-of-way was concerned, the United States had no such duty.

1. As this Court previously held in *Rayonier Incorporated* v. *United States,* 225 F. 2d 642, 646, the right-of-way held by P.A.W. was "at least equivalent to an easement". The record in this case fully supports this conclusion.

A strip of land 100-feet wide for a railroad right-of-way over and across, *inter alia,* Section 30, T 30 N, R 10 W., W.M., was conveyed to United States Spruce Production Corporation by warranty deed dated March 3, 1919 (Exhs. 3 and 4). As of March 31, 1937, the Spruce Corporation contracted with P.A.W. for the sale of all of its railroad property, under the terms of which contract P.A.W. had possession of the property with the enjoyment of all rights necessary to the carrying out of the contract, including especially the right of operating the property (Exh. 7). On May 3, 1938, P.A.W. filed a formal application with the Department of Interior, pursuant to the Right-of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, for the grant to it of a permanent right-of-way for that portion of the railroad which crossed Government-owned lands; and on September 18, 1939, the application was approved (Exhs. 101 and 102). As required by the Right-of-Way Act and regulations issued thereunder, P.A.W. entered into two stipulations, one dated July 18, 1938 with the Department of Agriculture, Forest Service, and the other dated August 2, 1939, with the Department of Interior, National Park Service, covering, *inter alia,* obligations and responsibilities of the railroad respect-

ing maintenance of the right-of-way, fire prevention measures, and the reporting and control of fires starting thereon (Exhs. 10 and 11). On November 30, 1946, the Spruce Corporation assigned and transferred to the United States all of its right, title and interest in and to the contract between it and P.A.W. (Exh. 8); and on the same date conveyed to the United States the railroad, including the real property (Exh. 5).[14]

With respect to rights-of-way grants under the Act of 1875, the United States Supreme Court in *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, held unequivocally that railroads enjoy an easement on their rights-of-way on Government lands. In *Himonas* v. *Denver & R. G. W. R. Co.,* 179 F. 2d 171, the Tenth Circuit followed this holding.

2. Since P.A.W. had an easement on the land over which the railroad ran, the United States had no common law obligation to maintain the right-of-way in a reasonably fire-safe condition. That duty was upon the railroad which enjoyed the easement and, upon the railroad's failure to perform it, the railroad alone was liable to third persons for injuries resulting therefrom. *Reed* v. *Allegheny County,* 330 Pa. 300, 303, 199 Atl. 187. See also *Pittsburgh, Cincinnati & St. L. R. Co.* v. *Jones,* 86 Ind. 496;[15] *Herzog* v. *Grosso,* 41 Cal. 2d 219, 259 P. 2d 429; 2 *American Law on Property,* § 8.66; *Jones on Easements* (1898), § 831.

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[14] This conveyance contained the recital quoted *supra,* pp. 8-9.

[15] In rejecting the railroad's argument in this case that, since it held only an easement it could not be liable to the plaintiff who held the fee, the court pointed out that the parties stood in the relationship of landed proprietors bordering on each other (at p. 499).

There are no Washington decisions specifically passing on this point. However, as this Court implicitly recognized in its earlier opinion, this is no reason to believe that Washington would not accept this principle. It is to be noted that, under Washington law, where a railroad fails to maintain its right-of-way in a reasonably fire-safe condition and a fire is started thereon by one of its locomotives, the railroad is accountable for resulting damage to adjoining property owners. See *Abrams* v. *Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Firemen's Fund Ins. Co.* v. *Northern Pacific Ry. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton* v. *C. M. & St. P. R. Co.*, 97 Wash. 441, 166 Pac. 644; *Jordan* v. *Spokane, Portland & Seattle Ry. Co.*, 109 Wash. 476, 186 Pac. 875. This is also the rule applied in virtually every other jurisdiction. See cases cited 18 A.L.R. 2d 1090, *et seq.*, 111 A.L.R. 1146, *et seq.*, 42 A.L.R. 799, *et seq.* In none of these cases imposing liability on the railroad in possession was there the remotest suggestion that liability might also be imposed upon the holder of the fee.

Nor did the reservation of a right of entry by the United States for purposes "not inconsistent with the enjoyment of said right of way by the [railroad], its successors and assigns," [16] affect the application of

[16] Exhs. 10 and 11. It does not appear, as found by the district court (Fdg. III, R. 229) that there is any provision in the conditional sales contract (Exh. 7) giving the Government a right of access to fight fire on the right-of-way and to abate fire-hazardous conditions thereon. Such rights of entry as the Government may have had for this purpose must be found, if at all, by implication from the provisions in these stipulations executed in connection with the grant of the permanent right-of-way by the Secretary of the Interior.

these legal principles. For the United States to be liable to third parties for the condition of the right-of-way, the Government must have assumed the obligation to maintain it. 225 F. 2d at p. 646. This it did not do. The right reserved was solely for the benefit of the Government; it was not coupled with any undertaking by the United States to maintain the right-of-way; and it was in no sense equivalent to an assumption of such an obligation. On the contrary, the stipulations entered into between the Government and the railroad placed this obligation squarely upon the railroad.[17] In these circumstances, third persons suffering injury resulting from failure to maintain the right-of-way must look to the railroad for damages. Cf. *The Dalles City* v. *River Terminals Co.*, 226 F. 2d 100 (C.A.

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[17] The stipulation with the Forest Service (Exh. 10) required the railroad, *inter alia:*

> 7. To prevent the spread of fire originating on the Applicant's right of way, or through its agency or neglect, and/or if it fails to do so, to reimburse the Forest Service for money necessarily expended in preventing the spread of such fires; * * *
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> * * * * *
>
> 8. To clear and keep clear of any timber and other inflammable substances, all of said right of way, all other lands owned or controlled by the Applicant as a right of way however acquired, lying between the points where the center line of said right of way intersects said Forest boundaries, and all lands of said Forest within 200′ of said centerline; * * *
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> * * * * *
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> 12. To cut all snags over 15′ in height 12″ D.B.H. within 150 feet of center line. To clear and keep clear for a distance of 2 to 4 feet beyond end of ties, the grade to mineral soil in a manner satisfactory to the Forest Officer in charge.
>
> 13. To burn inflammable material accumulating during construction or maintenance within 25 feet on each side of the track in the discretion of the Forest Officer in charge.

9); *Miles* v. *Spokane, Portland & Seattle Ry. Co.*, 176 Ore. 118, 155 P. 2d 938.

Neither did the Cooperative Agreement between the United States and the State of Washington for the protection of lands within the specific areas designated place any obligation upon the United States to maintain the railroad right-of-way. This was essentially a fire-fighting agreement; and it is devoid of any provision which could reasonably be construed as placing upon the Government the duty to go upon private lands within its protective area and abate fire hazards as part of its fire protection duties thereunder.[18]

As the district court recognized, there is no clear-cut decision holding the owner of a servient estate liable under any Washington statutes for the abatement of a fire hazard created by and existing on the dominant estate (R. 192). To bring the United States in this case within the ambit of R.C.W. §§ 76.04.350 and 76.04.370, which were cited by the court, it would be necessary to show that where these statutes refer to the "owner" of land they mean the holder of the servient estate where a fire hazard exists on a right-of-way. There is nothing in the statutes to so indicate, and none of the Washington cases cited by the district court or appellants so construe them.[19]

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[18] It is to be noted that Forest Service officials did request P. A. W. on numerous occasions to clear the right-of-way and to maintain it, but because of financial difficulties the railroad did not carry out these obligations. See Exhs. 19-23, inclusive.

[19] *Swan* v. *O'Leary*, 37 Wash. 2d 533, 225 P. 2d 199, was a quiet title action in which the court held that the grant of a right-of-way, although made by deed, gave an easement which, upon abandonment, reverted to the successors of the original owners of the lands.

On the other hand, a decision of the Washington Supreme Court lends support to our position that these Washington statutes imposed a duty only upon the railroad with regard to the condition of the right-of-way. In *Great Northern Ry. Co.* v. *Oakley,* 135 Wash. 279, 237 Pac. 990, the receiver of a logging company which had a contract for logging certain lands disclaimed any liability for damage caused by slash fires originating on such land. The holder of the title to the lands contended that the insolvent logging company, and therefore its receiver in possession, was responsible under the predecessor to § 76.04.370 for abatement of the slash and for any damages caused by fire originating therein. The court agreed, holding that the receiver in possession was the "owner" within the contemplation of the statute, or in any event he was the "person responsible" for the existence of the slash and as such was liable. This decision strongly suggests that were the Washington Supreme Court squarely

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In *State of Washington* v. *Canyon Lumber Corp.,* 46 Wash. 2d 701, 284 P. 2d 316, the court read Section 76.04.370 as applying to those who, unlike the Government with respect to this right-of-way, had possession of the land on which the combustibles allegedly existed; and the court gave no consideration to the question of whether third persons had any rights of recovery for fire loss beyond their rights under the common law. Likewise in *Prince* v. *Chehalis Savings & Loan Assn.,* 186 Wash. 372, 58 P. 2d 290, there was no question of who was the "owner" of the land under the statute, the court simply holding the undisputed owner of the land liable for fire which spread from combustibles on his property to the damage of others. In *Northern Pacific Ry. Co.* v. *Mentzer,* 214 Fed. 10 (C.A. 9), the court held that the Northern Pacific, which permitted another company to use its tracks, was jointly liable for a fire started directly upon the plaintiff's property by sparks from the using company's engine, since under the law governing common carrier railroads the Northern Pacific was responsible for any unlawful or wrongful operation of the road.

confronted with the question, it would hold that the owner of the easement in possession, rather than the holder of the fee out of possession, is liable for damages resulting from a fire-hazardous condition on the right-of-way.

Section 76.04.380, which was also cited by the district court (R. 192), is a fire-fighting statute, and additionally it becomes operative only upon notice. Thus it has no applicability here. In any event, this section, no more than the other statutes, purports to change the common law, under which the United States had no duty to maintain the right-of-way.

It is not entirely clear whether either of the appellants is contending that the Government is liable under R.C.W. § 76.04.450 for the condition of the right-of-way. The district court does not mention this statute in connection with any duty on the part of the United States, and appellants Arnhold appear to use it only in connection with their argument respecting Fibreboard liability (A. Br. pp. 55-56). Appellant Rayonier asserts (R. Br. p. 12) that the Government "had duties imposed" by this section. However, since the United States did not "do any act" on the right-of-way which exposed the forest to a fire hazard. the statute is in terms inapplicable to it in this case.

Contrary to the district court's apparent belief (R. 193), this is not a situation where the United States, otherwise liable to third parties, attempted to absolve itself by placing the obligation of maintenance upon the railroad under the stipulations noted above. The United States had no duties with respect to the right-of-way other than the negative one of not interfering

with the railroad's use thereof. The obligation of maintenance was in law that of the railroad from the time it acquired its easement.

It follows that since the United States had no duty at common law, under the Cooperative Agreement, or under Washington statutes to maintain the railroad right-of-way in a reasonably fire-safe condition, the district court erred as a matter of law in finding it negligent in this respect. We stress again, however, that, in light of the district court's finding (XIII) that it was not established that the condition of the right-of-way caused or contributed to the spread of the fire, we do not believe this Court will need to consider the matter.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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